

Judge Vaidik, cont.

1997 Indiana Judges Association Special Merit Award.

Judge Vaidik was appointed to the Court of Appeals in February 2000 by Governor Frank O'Bannon and was retained by election in 2002 and 2012. Because Judge Vaidik sees the Court of Appeals at the intersection of theoretical and practical law, she believes the Court should embody the highest degree of fairness and impartiality.

This view informs her passion for teaching, as she feels that Hoosiers, and all litigants, deserve the finest possible legal advocates on their behalf. Judge Vaidik also believes that legal writing must be distinguished by logical construction and clear, explanatory prose.

She is an adjunct professor at the Indiana University Maurer School of Law and won its 2011 Adjunct Professor of the Year Award. She has served as a visiting professor at the College of Law of England and Wales and taught as an adjunct professor at Valparaiso University Law School. She has taught at many law schools and for a number of organizations including the Indiana State Bar Association, the Indiana Legal Education Forum, and the Indiana Judicial Center.

Judge Vaidik has trained lawyers involved in prosecuting Rwandan war crimes, Mexican lawyers prosecuting drug lords, and solicitor advocates seeking the rights of audience in the High Courts in Belfast, Northern Ireland. She is particularly

proud of her long association with the National Institute of Trial Advocacy, which honored her with its 2007 Robert Keeton Faculty Award.

Despite her Court of Appeals caseload and her teaching, Judge Vaidik is also actively involved in a wide variety of community, legal, and judicial organizations. She served on the State of Indiana Children's Peak Performance Commission and has held many posts with the Indiana Judges Association and Indiana Judicial Center. She has been chairperson of the Judicial Education and Community Relations Committees of the Indiana Judicial Center and is a member of the American Bar Association, Indiana State Bar Association, and Sagamore Inns of Court.

She has received many other awards and honors including the 2004 Indiana State Bar Association's Women in Law Achievement Award, the 2007 Indiana Lawyer Distinguished Barrister Award, the 2003 Paragon of Justice Award from Valparaiso University Law School, and the Sagamore of the Wabash Award from two Indiana governors.

Judge Vaidik and her husband are the proud parents of twin daughters, one a medical doctor and one a lawyer, and they have two grandsons, who can choose either profession.

Judge Baker, cont.

demic Affairs committee.

Judge Baker was retained by election in 1992, 2002 and 2012. He and his wife have five children and—so far—nine grandchildren.

Attorneys for the Parties

For the Appellant

Susan D. Rayl earned her Bachelor of Science degree from Indiana University-Purdue University Indianapolis and her Juris Doctor from Indiana University School of Law-Indianapolis.

She began her career by working for criminal defense attorney Richard Kammen as a law clerk, and was hired by Mr. Kammen and his partner, Ms. Susan W. Brooks, as an associate upon her graduation. Ms. Rayl worked with Mr. Kammen for eight years before limiting her practice to appeals so she could work from home while her son was young.

Ms. Rayl returned full time as a criminal defense attorney in 2009, partnering with her husband, Michael Smith, to form Smith Rayl Law Office, LLC. Ms. Rayl has practiced all aspects of criminal defense and criminal appeals throughout Indiana for 20 years. Ms. Rayl has represented more than 100 individuals in criminal appeals.

Ms. Rayl enjoys professionally partnering with her husband and they still like one another despite nearly 22 years of marriage. Ms. Rayl has a step-daughter who anticipates receiving her PhD in nuclear physics this May from Michigan State University, and a son who attends the University of Illinois, where he competes for the Illini Men's Gymnastics team.

For the Appellee

Larry D. Allen began working in the Office of the Indiana Attorney General in early 2012 as a law clerk and is currently a Deputy Attorney General in Criminal Appeals.

Mr. Allen graduated from Olivet Nazarene University in 2004 with a major in political science. Before going to law school, he worked in the non-profit sector in the areas of international human rights and media.

Mr. Allen earned his law degree from Indiana University McKinney School of Law in 2012. While in law school, he participated in the Staton Moot Court Competition, the Global Crisis Leadership Forum, and earned the Norman Lefstein Award of Excellence for his *pro bono* work with Indiana Legal Services' Senior Law Project.

Mr. Allen is from Bloomington where he currently lives with his wife, Jennifer.

COURT OF APPEALS OF INDIANA ORAL ARGUMENT AT A GLANCE

VINCENNES UNIVERSITY

Brummett v. State of Indiana

CRIMINAL LAW ISSUES:

- Whether the State committed misconduct that rose to the level of fundamental error;
- Whether the State presented sufficient evidence for all convictions;
- Whether the trial court abused its discretion by admitting testimony about an uncharged crime;
- Whether the State committed misconduct by objecting to certain questions posed at trial by Appellant.

ORAL ARGUMENT:

Wednesday, April 2, 2014
1:30 p.m.

APPEAL FROM:

Marion Superior Court
The Honorable
Marc T. Rothenberg, Judge

Synopsis: *Case No. 49A02-1304-CR-378*

Brandon Brummett appeals his convictions of Class B felony child molesting, Class C felony child molesting, and three counts of Class D felony sexual misconduct with a minor.

Brummett is the cousin of K.A., born Nov. 13, 1996, and A.A., born April 4, 1998.

When A.A. was eight or nine years old, Brummett touched her vagina, twice on top of her clothes and once underneath her clothes.

When K.A. was nine or ten years old, Brummett touched her vagina, twice on top of her clothes and once underneath her clothes. When K.A. was 15, Brummett touched K.A.'s vagina under her clothes while they were gathered around a table playing cards with other family members.

K.A. reported the incidents to her

mother, who asked A.A. if Brummett had also touched A.A. A.A. indicated he had, and their mother called the police.

Brummett was found guilty of all charges after a jury trial.

Brummett alleges the deputy prosecutor committed misconduct when she improperly disparaged "Defense Counsel Specifically, and Defense Lawyers Generally[;]" improperly vouched for the credibility of some of the State's witnesses; and "Committed Misconduct by Asking Questions of Mr. Brummett That Were Argumentative and Inflammatory[.]"

Brummett did not object to any of these comments or questions, and thus we review his claim of prosecutorial misconduct for fundamental error, which requires the misconduct

be so severe as to make a fair trial impossible or a clearly blatant violation of basic and elementary principles of due process that presents an undeniable and substantial potential for harm.

The State contends all comments and questions were appropriate commentary regarding the evidence before the jury.

Brummett also argues that the State did not present sufficient evidence to convict him of Class D felony sexual misconduct with a minor against K.A. because K.A.'s testimony was incredibly dubious.

For testimony to be "incredibly dubious" it must be inherently improbable, coerced, wholly uncorroborated, or run counter to human experience.

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What happens after oral argument?

After oral argument, a designated "writing judge" drafts an opinion for the others to consider.

Generally, opinions affirm or reverse lower court rulings in whole. But some affirm in part, reverse in part, or both. Not infrequently, the opinion instructs the trial court about next appropriate steps.

Many opinions are unanimous, although non-unanimous opinions (2-1) are not uncommon. Judges sometimes write separate concurring or dissenting opinions that emphasize different points of law or facts than the main opinion.

Once issued, all opinions are published on the court's website and are permanently maintained by the Clerk of Appellate Courts.

No rules or laws govern how fast the Court of Appeals must issue an opinion. But the court strives to decide cases within four months of receiving all briefs, transcripts and other records.

Parties can appeal Court of Appeals decisions to the Indiana Supreme Court by filing a petition to transfer. But transfer is not automatic; the Supreme Court can grant or deny transfer with or without giving a reason.

If the petition is denied, the Appeals Court decision stands.

Synopsis, cont.

K.A. testified that Brummett touched her inappropriately while the two were seated at a table with several family members playing a card game. Brummett contends K.A.’s testimony was incredibly dubious because no other family members noticed anything suspicious and the actions K.A. alleged could not have occurred without someone else noticing them.

The State contends that K.A.’s testimony did not run counter to human experience, a tablecloth hid Brummett’s inappropriate touching of K.A., and K.A.’s fear of Brummett kept her from vocalizing what was occurring at the time.

Finally, Brummett argues that the trial court abused its discretion when it permitted A.A. to testify, in violation of a motion *in limine*, regarding allegations of molestation occurring outside of Indiana.

Regarding the same issue, Brummett asserts the deputy prosecutor committed prosecutorial misconduct when she objected to a question defense counsel asked Brummett regarding the allegation.

Brummett did not object to the testimony or objection, and thus he must demonstrate fundamental error.

Brummett contends the admission of the testimony made a fair trial impossible because the testimony permitted the jury to make the “forbidden inference” that Brum-

mett’s alleged prior wrongful conduct suggested his guilt of the charges against him.

In addition, Brummett argues that the deputy prosecutor’s objection could have been framed in a way as to not bring the issue of the motion *in limine* before the jury.

The State argues that even if the admission of the evidence was an abuse of discretion, it was harmless error because the testimony was a singular reference to “something” that happened out of state and the reference was too vague to be prejudicial.

Regarding the objection, the State argues that Brummett’s questioning “opened the door” to the issue of the out-of-state allegations.

Indiana 1891: Every docket tells a story

Indiana Appellate Court Reports, Vols. 1, 2, and 3, include the complete written opinions of several hundred cases decided by the court in its first two terms. Naturally, the legal issues before the court were many and varied. But the underlying facts, taken together, paint a vivid picture of Indiana’s economy and society circa 1891 – the same year James Naismith invented basketball.

Agriculture was an economic mainstay, and even city residents maintained livestock. In *The Noblesville Gas and Improvement Company v. Teter*, the court affirmed damages of \$60 against the gas company for the death of Teter’s cow after it fell into an open gas line trench.

The opinion notes that by county and city ordinance, “cows were permitted to run at large within the city (of Noblesville) within the day time.”

Railroads were frequent litigants. *Vols. 1, 2, and 3* record 34 railroad-related appeals, many involving damages to livestock, but also other issues. In a disputed-fare case from Greene County, the court ruled for the railroad but admonished the company “if unnecessary force was

used in expelling the appellee from the train.”

Vol. 1 also includes two cases involving The Western Union Telegraph Co. One of them, *Western Union v. Trumbull*, cited an 1885 law that anticipates current legal and policy arguments about **Internet neutrality**.

The relevant passage of the law said that telegraph companies “shall in no manner discriminate in rates charged, or words or figures charged for, or manner or conditions of service between any of its patrons, but shall serve individuals, corporations and other telegraphic companies with impartiality.”

Then as now, fraught **domestic relations** occupied a significant share of the docket.

In *Story v. Story*, the court affirmed judgment against a father who’d been sued by his daughter for nonpayment of \$3 a week for house and farm work.

Marshall et al v. Bell involved a father’s promissory note for support and maintenance of a “bastard child.”

And in *Adams v. Main*, the court affirmed a trial court’s judgment that

the appellant had alienated the affections of the appellee’s wife, even without proof of adultery. Such proof was not required, per the Appeals Court.

Contract disputes comprised a large part of the docket, too, and some describe prevailing wages and prices.

In *Greene v. McIntire et al*, the court affirmed judgment against New York City grain merchants who had contracted to buy 20,000 bushels of “grade No. 2 red wheat” from a Knox County farmer. Price: \$14,891, or 74 cents per bushel. (In December 2013, March 2014 wheat deliveries were trading at \$6.39/bushel at the Chicago Board of Trade.)

Another case put the value of a Warren County house, lot, furnishings, and various materials and repairs at \$531.85.

Vols. 1, 2, and 3 include just **18 criminal appeals** (all others assigned to the Supreme Court), many involving crimes of vice such as gambling, liquor violations and prostitution (referred to in one case as “a certain house of ill fame” in Valparaiso).

The court affirmed the trial court’s decision 13 times, or 72 percent.

Today’s Panel of Judges

The Honorable
John G. Baker
(Monroe County)

John G. Baker was named to the Court of Appeals in 1989, which makes him the longest-serving member on the current Court. He has served as Presiding Judge of the Court’s First District, which covers all of southern Indiana, and as Chief Judge of the Court from 2007-2010.

Judge Baker grew up along the Ohio River in Aurora, IN, but attended high school at Culver Military Academy in northern Indiana. He studied history at Indiana University-Bloomington, and later received his law degree from Indiana University School of Law-Bloomington.

He practiced law in Monroe County for many years before joining the Monroe County bench as first a county and later a Superior Court Judge. Diligently, he handled more than 15,000 cases in 13 ½ years on Monroe County benches, and has written more than 4,000 majority opinions for the Court of Appeals.

Judge Baker is greatly interested in the history, structure and organization of Indiana’s judicial branch of government. He regards Indiana judges not as remote figures who conduct abstract arguments, but as people fully engaged in the life of the law and their communities.

He has taught in college and law school and is active in local, state and national bar associations. In 2013, Judge Baker retired after 33 years of teaching at the School of Public and Environmental Affairs, Indiana University-Bloomington. He continues to teach during the Spring semester at the McKinney School of Law.

Judge Baker’s many community activities include his church, the YMCA and the Boy Scouts (where he attained Eagle Scout status as a youth).

In 2011 he joined the Board of Trustees of Garrett-Evangelical Theological Seminary in Evanston, IL, where he serves on the board’s Aca-

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The Honorable
Nancy H. Vaidik
(Porter County)

Nancy H. Vaidik is a judge and a teacher with broad experience in both trial and appellate courts and in legal classrooms. She has an expertise in trial advocacy and appellate advocacy, with a strong background in the rules of evidence and legal mediation.

Judge Vaidik was selected by her colleagues as **chief judge** of the Court of Appeals for a three-year term beginning Jan. 1, 2014.

Judge Vaidik grew up in Portage, Indiana, and is a sixth-generation Hoosier who retains strong ties to her home town. She graduated with high distinction from Valparaiso University in 1977, with a double major in political science and psychology, and then studied at Valparaiso University Law School, where she earned her Juris Doctor in 1980.

Her early years as deputy and then chief deputy Porter County prosecutor provided the grounding for her judicial career. As an attorney, she tried over seventy-five jury trials and founded the Porter County Victims Assistance Unit, the Porter County Sexual Assault Recovery Project, the Domestic Violence Service, and the Valparaiso University Law School Mediation Clinic. She also served on the Porter County Community Corrections Board and led a countywide task force that spearheaded the eventual construction of a new county jail. After serving as a prosecutor, she went into private practice and specialized in domestic relations, probate, municipal law, and general litigation. She represented Caring Place, Inc., a shelter for battered women in Valparaiso.

From 1992 to 2000, she served as the judge of the Porter Superior Court. During her tenure on the trial court, Judge Vaidik was awarded a wide range of honors including the 1996 Indiana Domestic Violence Coalition Judge of the Year and the

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The Honorable
Melissa S. May
(Vanderburgh County)

Born in Elkhart, **Melissa S. May** studied criminal justice at Indiana University-South Bend before earning her law degree from Indiana University School of Law-Indianapolis in 1984. She then launched a 14-year career in private legal practice in Evansville that focused on insurance defense and personal injury litigation.

Judge May moved directly from private practice to the Court of Appeals in 1998 and was retained by election in 2000 and 2010. Prior to this year, she served as Presiding Judge of the Fourth District, which covers all of Indiana.

Judge May has long been active in local, state and national bar associations and foundations, with a particular focus on continuing legal education and appellate practice. At various times, Judge May has chaired the Indiana State Bar Association’s Litigation and Appellate Practice sections and was secretary to the Board of Governors.

As chair of the Indiana Pro Bono Commission (for the public good), Judge May worked with 14 pro bono districts to train lawyers and mediators on how to assist homeowners facing foreclosure. She also serves on an Indiana Judicial Conference Committee that translated all civil jury instructions into “plain English.”

Judge May teaches trial advocacy at Indiana University McKinney School of Law and frequently speaks on legal topics to attorneys, other Judges, schools, and other professional and community organizations. She is special counsel to the American Bar Association’s Standing Committee on Attorney Specialization, on which she’s served since 2003.

In October 2011, Judge May received the Women in the Law Recognition Award from the Indiana State Bar Association for her dedication to helping women advance in the legal community.

She and her husband live in Morgan County.